APPELLATE TRIBUNAL INLAND REVENUE, LAHORE BENCH, LAHORE

ITA No.1344/LB/2022.
(Tax Year 29015)

M/s. Usman Ali, Gujranwala. ..... Appellant

Versus

The CIR, RTO, Gujranwala. ..... Respondent

Appellant by: : Mr. Abuzar Hussain, Advocate.

Respondent by : Mr.Talat Mehmood, D.R.

Date of Hearing : 23.02.2023
Date of Order : 24.03.2023

ORDER

RIZWAN AHMED URFI (ACCOUNTANT MEMBER):The appellant is registered as an individual earning his income from property and agriculture during the tax year-2015. This appeal is filed under section 131(1) of the Income Tax Ordinance, 2001 (**"the Ordinance, 2001"**) at the instance of appellant for the tax year-2015 against impugned Order-in-Appeal dated 15-02-2022 recorded by learned Commissioner Inland Revenue of Appeals, Regional Tax Office, Gujranwala.

2. Succinctly, the history of the case is that the Assistant/Deputy Commissioner Inland Revenue, Regional Tax Office, Gujranwala has issued a show cause notice dated 28-05-2021 under section 122(9) for amending assessment under section 122(1) read with section 122(5)(ii) of the Ordinance, 2001 as to why addition of Rs.365,386,206/- may not be made under section 111(1) (d) of the Ordinance, 2001 in his income for the tax year-2015. During adjudication proceedings, appellant contested his case on the basis of relevant documents leading the Assessing Officer to accept his contention to the extent of (i) Credit differences in bank accounts (ii) Interbank Transactions (contra-

entries), (iii) Cheque returns, (iv) Profit on debit, (v) rental income (vi) agriculture income to the extent of Rs. 75,000/-. Conversely; the remaining amount of agriculture income and a sum of bank credits received on behalf of his family members are added back to his income for an amount of Rs. 184,629,948/- under section 122(1) and section 122(5) (ii) of the Ordinance, 2001 through his order dated 26-06-2021. Being aggrieved, an appeal was filed before the then Commissioner of Appeals, Gujranwala who has upheld this Assessment Order through his Order-in-Appeal dated 15-02-2022 currently impugned before this Tribunal in titled appeal case.

It is not out of concern to mention here that appellant already confronted with the same issue regarding sales of residential plots at CBR Housing, Gujranwala acquired against his inherited land falling in its vicinity and its payment received by way of bank credits appearing in bank accounts which are duly declared for the purpose of income tax. Assessment proceedings were primarily initiated against him under section 122(5A) of the Ordinance, 2001 by the Additional Commissioner. Consequently, appellant preferred an appeal before the Commissioner Inland Revenue of Appeals, Gujranwala who has upheld the original decision to the extent of chargeability of income tax under section 18 after allowing cost of assets to be worked out at fair market value of it. He has directed learned Additional Commissioner Inland Revenue to calculate fair market value of plots sold as per provisions of section 68 read with section 75 and 76 of the Ordinance, 2001 for the period in question and to reduce that amount from gain as required under section 18 read with section 20 of the Ordinance, 2001 through his Order-in-Appeal dated 25-01-2021 passed under section 129(1) of the Ordinance, 2001.

4. The appellant has vehemently contested the orders of learned Commissioner of Appeals confirming the amended assessment order now passed under section 122(1) read with section 122(5) (ii) of the Ordinance, 2001. The order dated 26-06-2021 under section 122(5) (ii) of the Ordinance, 2001 is beyond the jurisdiction as the Assistant

Commissioner or as the case may be the Deputy Commissioner could not assume the jurisdiction of amendment when his supervisory officer who is an Additional Commissioner in rank exercising powers vested in him under section 122(5A) of the Ordinance, 2001 has already amended the assessment through his order dated 06-10-2020. This amended assessment order dated 06-10-2020 has merged into the appellate order dated 25-01-2021 by the Commissioner of Appeals. It is settled principle that where in a case the higher authority amends or modifies the assessment order of the lower authority or any deemed assessment order, then that order stands merged with order of higher authority. The order under section 122(1) of the Ordinance, 2001 is beyond the jurisdiction as the Assistant /Deputy Commissioner may further amend under section 122(4) only the order already amended by him, not the order earlier amended by the Additional Commissioner under section 122(5A) of the Ordinance, 2001. He relied upon on the judgment reported at **[2007 PTD (Trib) 646].**

5. The moot issue in both the orders, [the Order dated 26-06-2021 under section 122(1) (5) (ii) and the prior Order dated 06-10-2020 under section 122(5A)] is quite similar in its material substance. The order under section 122(5A) of the Ordinance, 2001 was passed to convert capital gains on sale of inherited land into adventure in trade and to tax it accordingly whereas, the order under section 122(1) (5) (ii) is passed to add back bank credits as business income against sale of Citi Housing plots acquired in exchange of inherited agriculture land of appellant taxpayer. Once, the sale of plots at Citi Housing is taxed as unexplained assets under section 122(5A) of the Ordinance, 2001 and then its monetary consideration received in the form of alleged bank credits is put to imposition of tax as an unexplained income otherwise; it is the other side of the same coin causing duplications to the major extent in creating tax liabilities not permissible under any of the fiscal laws.

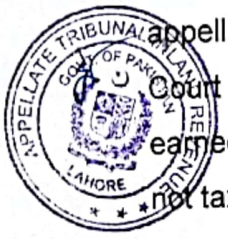
6. It is stated with greater concern that the deemed assessment order under section 120(1) in the instant case was first amended being

erroneous and prejudicial to the interest of revenue under section 122(5A) of the Ordinance, 2001 through Order dated 06-10-2020 and was merged into the appellate order dated 25-01-2021 by the Commissioner of Appeals and was nomore existent and available for making amendment under section 122(4) read with section 122(5A) by the Additional Commissioner as barred under law by the doctrine of merger. Even otherwise, brushing aside the doctrine of merger in its complete ouster even then; in pursuance of section 122(4) if any further amendment was warranted it could legally be made only by the Additional Commissioner within the ambit of the provisions of section 122(5A) of the Ordinance, 2001 and by none else who is lower in rank to him. Therefore, the order dated 26-06-2021 of Assistant/Deputy Commissioner under section 122 (5) (ii) of the Ordinance, 2001 passed without any authority is not sustainable in the eye of law due to lack of any lawful jurisdiction.

7. Besides; the impugned show cause notice dated 28.05.2021 is issued with the intention to amend the deemed assessment under section 120 of the Ordinance, 2001 despite the fact that it is already amended under section 122(5A) of the Ordinance, 2001 hence; this deemed assessment order is merged into the amended assessment order passed under section 122(5A) which is further merged into the appellate order dated 25-01-2021 by the Commissioner of Appeals and was nomore available for making of its reassessment under section 122(1) (5)(ii) of the Ordinance, 2001. In judgment reported as **[1997 PTD 47]** it is held; **"**As the notice prima facie is defective and the error is not curable as it does not indicate the reason to re-assess the said income already assessed in the hand of the petitioner. The entire proceedings are null and void".

8. Learned counsel of the appellant has otherwise; pleaded that when there is no denial of the fact that alleged credit entries from sale of plots which the taxpayer and his family members acquired as a result of agreements with City Housing against exchange of their inherited agricultural land, the income earned, if at all, from those plots

was exempted under section 37 of the Ordinance, 2001 as capital gain and is not subject levy of tax under section 111(1)(d)(ii) whose provisions are wrongly invoked by the assessing officer. Learned counsel has contended that this issue is already decided in favour of the taxpayer in his own case bearing I.T.A. No. 1955/LB/2020 dated 02-10-2020 pertaining to the tax year-2013. Thus, it established that the gain otherwise; earned by him is not a business income or adventure in the nature of trade as earlier held by the Tribunal as not assessable under section 37 of the Ordinance, 2001. The impugned order therefore; merits vacation on this factual ground as well. The appellant has relied upon on the judgment of Hon'ble Madras High Court cited at **[(1977) 36 Tax 48 (HC. Ind)]** whereby it is held that gain earned by a person under identical circumstances as "capital gain" is not taxable under law.



9. Even otherwise, the Assessing Officer is not justified to treat all the bank credit entries as "receipts liable to tax" in terms of section 111(1)(d)(ii) of the Ordinance, 2001 as "receipts liable to tax" are duly defined widely through the provisions of section 18 of the Ordinance, 2001. All the bank credit entries are not liable to tax instead it is the receipts liable to tax which are to be included in the business income of a taxpayer in terms of section 111(1)(d)(ii)(b) of the Ordinance, 2001 which strengthens the stance taken at instance that the suppressed amount of any item of receipts liable to tax shall be included in the person's income chargeable to tax under the head, "income from business" and not all the bank credit entries at lump sum could be taken as income of a taxpayer.

10. Nevertheless, learned Commissioner of Appeals is not justified to confirm the order passed under section 122(1) (5) (ii) of the Ordinance, 2001 through which an addition of **Rs. 286,489,500/-** is made on the basis of bank credit entries. The credit entries in the bank statement do not constitute definite information as held by in the judgment reported at **[2016 PTCL (Trib) 2376], [2006 PTD (Trib) 2012] and [1992 PTD 739].** The Inland Revenue is not competent to assume and exercise its

jurisdiction under section 122(5) of the Ordinance, 2001 without acquiring **"definite information"** through **"audit"** or otherwise. There is no cavil to the preposition of law that where assumption and exercise of jurisdiction is subject to fulfillment of statutory condition or existence of certain specified circumstances then those conditions must be obeyed accurately and strictly and those circumstances must exist. The act performed disregard to those conditions or circumstances would be void ab-initio and without lawful jurisdiction. Defective assumption/exercise of jurisdiction and eventual judgment on it has no legal effect in the eyes of law. He relied upon on the judgments as reported at [2010 SCMR 1746], [PTCL 2008 CL. 337(S.C)] and [1971 SCMR 681].

11. Learned Commissioner of Appeals is not justified to confirm the order of under section 122(1) (5)(ii) of the Ordinance, 2001 inter alia on the grounds that appellant has accepted the bank accounts and this acceptance leads to establishment of definite information. The denial or acceptance by appellant of his bank accounts does not constitute definite information.

12. The order under section 122(1) (5)(ii) passed without issuing any notice under Rule 68 of the Income Tax Rule 2002 which is also mandatory prerequisite for assuming jurisdiction under section 122 of the Ordinance, 2001. Reliance in this regard is placed on following judgments reported at [1971 SCMR 681], [2001 PTD 1633 HC], [2013 PTD (Trib) 1335], [2006 PTD (Trib) 429], [2011 PTD (Trib) 321] and [2011 PTD Tribunal 1820].

13. Nevertheless, the addition of Rs. **286,489,500/-** under section 111(1)(d) of the Ordinance, 2001 was made by rejecting appellant's stance unjustifiably as that very differential amount is received on behalf of Ch Muhammad Ajmal Khan, father of appellant and on behalf of his other family members against their share in sale of plots in Citi Housing, Gujranwala. This contention of appellant is rejected in the presence of valid documentary evidence put on record by appellant in support of his view point. The order under section 122(1) of the Ordinance, 2001

passed by making an addition under section 111(1) (d) of the Ordinance, 2001 on the basis of presumptive and assumptive assertions which is against the spirit of law. The order is passed by making an addition on account of unexplained receipts under section 111(1) (d) of the Ordinance, 2001 in total income transacted on his own accord as well as on behalf of his family members against sale of plots whose consideration received in appellant's bank account is subsequently remitted and paid to his father and real brother according to their shares. The trail of said amount prominently showing the date, cheque numbers, amount and plot numbers, as duly provided to Inland Revenue Officer in the form of extracts of banks statements. In this regard, the sale agreement was also provided based on this score alone, the case needs deletion in its entirety.

14. Learned Departmental Representative on the other hand has opposed the contentions of appellant and has supported the impugned order of learned Deputy Commissioner Inland Revenue and consequent order passed by learned Commissioner of Appeals by reiterating all the arguments as taken earlier.

15. We have given due consideration to the arguments put forth by both the parties and have perused the relevant available record. Before parting with the judgment on other issues raised at the bar, we have first to evaluate legal objection of jurisdiction as hoisted at the very outset of appellant's arguments. It is an established fact that the Additional Commissioner has already amended the deemed assessment order through his Order dated 06-10-2020 in exercise of powers under section 122(5A) of the Ordinance, 2001 therefore; the Assistant Commissioner or as the case may be the Deputy Commissioner Inland Revenue being junior in hierarchy cannot make any further amendment in it keeping in view the special provisions of section 122(5A) of the Ordinance, 2001. If any such further amendment is required under law, it could only be made by an Additional Commissioner under section 122(5A) hence; the order dated 26-06-2021 under section 122(1) (5) (ii) of the Ordinance, 2001 passed in its

subsequence by Assistant Commissioner/Deputy Commissioner Inland Revenue who is lower in rank to him is not tenable due to jurisdictional defect despite having found it already amended by his supervisory Inland Revenue Officer particularly when the issue at hand is similar in its material substance.

16. Besides, the deemed assessment under section 120 of the Ordinance, 2001 had already merged into the amended assessment order dated 06.10.2020 of the Additional Commissioner under section 122(5A) ibid as further merged into appellate order dated 25.01.2021 of learned Commissioner of Appeals. Any intent to amend this order later under section 122(1) read with section (5) (ii) of the Ordinance, 2001 would be of no legal force, for there cannot be any duplicity as to assessment taxing in the same subject matter twice. In the light of the precedence as cited infra, on emergence of a subsequent assessment order while a pre-existing assessment viz-a-viz its appellate order are already in place, the pre-existing assessment stands merged into the subsequent one later in sequence, thus vanquishing the need for any further reassessment for that matter.

17. The extended crux of the issue at hand is that the deemed assessment order cannot be amended as it is merged into the amending assessment order dated 06-10-2020 by the Additional Commissioner, whose order is further merged into the Appellate Order dated 25-01-2021 by the Commissioner of Appeals as all these orders are placed on record in its seriatim. In the presence of appellate order dated 25-01-2021 as emerged from all the previous orders including the deemed assessment order merged into the amended assessment order dated 06-10-2020, both the prior orders seize its existence due to their merger into the appellate order and are nomore available for amendment even by the Additional Commissioner himself as barred by the doctrine of merger also applicable in fiscal matters. Once an order is merged into the appellate order, it seizes its existence and is nomore available for any amendment in exercise of powers conferred upon the officer of Inland Revenue under section 122(4) of the Ordinance, 2001.

In this state of affairs, any nonexistent order cannot be amended by the officer of Inland Revenue in exercise of their powers for revision as embodied under section 122(4) of the Ordinance, 2001 or as the case may be under section 122(5A) of the Ordinance, 2001.

18. Based on above, it is easy to maintain that if the assessment order under section 120 of the Ordinance, 2001 is once changed, absorbed into or swallowed by the amended assessment order which is again merged into an appellate order and the amended part of the original assessment order also disappears, there is no longer need for any consequent assessment order by Assistant/Deputy Commissioner under section 122 (5) (ii) of the Ordinance, 2001. In one of the judgments of this Tribunal reported as [2011 PTD (Trib.) 936], the doctrine of merger is envisioned as under:-

> "The doctrine of merger, deals with orders between inferior and superior authorities, nevertheless, in our opinion, the doctrine of merger is applicable on all fours to the new concept of amendment. Because, "there cannot be, atone and the same time, more than one operative order governing the same subject-matter"..... Necessary effect of the amendment is that the amended part of the assessment order under section 120 is changed, absorbed into or swallowed by the amended assessment order and the amended part of the original assessment order disappears."

19. Lastly on the issue of jurisdiction, the Additional Commissioner has exercised the powers under section 122(5A) delegated to him by the Commissioner under sub-section (1A) of section 210 of the Ordinance, 2001 which are neither delegated to anyone else nor it could be delegated to any Officer of Inland Revenue below in rank to him. Based thereon makes it clear as daylight that the delegated powers cannot further be delegated therefore; exercise of jurisdiction for amending deemed assessment order by an Assistant/ Deputy Commissioner under section 122(1)(5)(ii) is illegal and unlawful as having already amended by the Additional Commissioner under section 122(5A) of the Ordinance, 2001 and is eventually merged into appellate order dated 25.01.2021.

20. We are consciously agreed with the contentions made at the bar that the stance adopted by the taxpayer regarding credit entries appearing in its accounts and disbursement of amount to father and real brother is assumed to be incorrect even then no addition under section 111(1)(d)(ii) can be made as in that case the income earned from sales of plots acquired from M/s. Citi Housing is exempt under section 37 of the Ordinance, 2001 being not business income and adventure in the nature of trade as already held by the ATIR vide its Order through its Income Tax Appeal No. 1955/LB/2020 dated 02-10-2020 pertaining to tax year-2013 therefore; nomore deliberation is required on the subject as we are satisfied with the issue already settled by the other bench of this ATIR. The relevant excerpt of its order as reproduced herein below is simply reconfirmed:--

> "We have noted that facts and circumstances are exactly similar as that of the above quoted case as well as of the taxpayer's case. There is no denial that the taxpayer was an owner of agriculture land which has been inherited by his grandfather some 41 years ago; he entered into agreements with M/s. City Housing Gujranwala, did not receive any consideration but resultantly certain residential/commercial plots were allocated against exchange of inherited agricultural land. Hence, land in question has not ceased to be agricultural land and its development by M/s. City housing is consisting with realization of capital investment and the surplus received by the taxpayer will not be a business income and adventure in the nature of trade. Hence, exempt and assessable under section 37 of the Ordinance as declared by the taxpayer."
>
> Therefore, in the facts and circumstances the case the ACIR is not justified in holding the gain earned by the taxpayer as business income and adventure in the nature of trade and the CIR (A) has also erred in law to uphold the same.
>
> For the forgoing reasons, we are the considered opinion that the order passed by the ACIR under section 122(5A) is not only without any lawful jurisdiction but also sustainable on factual grounds as well and the CIR (A) has erred in law to uphold the same and direction issued by him for recalculation of income is also not tenable. Hence, the orders of both the authorities below are annulled.

21. Based on what is stated above, the stance of appellant is found valid as duly backed by documentary evidences in support of its version. Since, the addition by the Inland Revenue is unlawfully made without any material justification and lawful jurisdiction therefore; it merits simply deletion and we order accordingly. This Tribunal feels no need to make any further deliberations on legal and factual issues urged for in the memo of appeal as also contested by the appellant during hearing since, the case is proved by appellant taxpayer in his favour through concrete documentary evidences as also succeeded in its entirety on the basis of incontrovertible legal grounds of jurisdiction as cited supra therefore; no need to give any judgment on other issues raised at the bar.

Sd/-

(RIZWAN AHMED URFI)
ACCOUNTANT MEMBER

Sd/-

(MUHAMMAD WASEEM CH.)
CHAIRMAN

Copy of the bench order forwarded to
1. The Appe[illegible] M/S Usman Ali, GIW.
2. THE CIR, [illegible]

By order

Assistant Registrar
Appellate Tribunal Inland Revenue
Lahore.